



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 24, 2023

IN THE MATTER OF:

Appeal Board No. 609283

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination (April 15, 2019) holding (hereinafter the "employer" or "STS") liable for contributions effective 4th quarter 2017 based on remuneration paid to G.K. David (hereinafter the "claimant") and all other similarly situated drivers as employees, under the common law and/or pursuant to the Commercial Goods Transportation Industry Fair Play Act (Appeal Board No. 609282 and 119-04231).

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits effective January 14, 2019 (Appeal Board No. 609283 and).

The Administrative Law Judge held combined telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor. By combined decisions filed November 8, 2019, the Judge sustained the initial determination.

The employer appealed the Judge's combined decisions to the Appeal Board. The Board considered the arguments contained in the written statement submitted by the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: STS, an interstate Department of Transportation registered trucking business, was operated by two brothers (and their spouses) who

dispatched drivers out of its terminal in Cicero, New York. STS utilizes drivers deemed independent contractors who could have their own trucks to haul commercial goods for its clients, including a pharmaceutical company, a dairy customer, and an office supply customer. STS had a fleet of tractor-trailers available for lease to drivers without their own vehicles. STS contracted with Subcontracting Concepts LLC (previously known as Subcontracting Concepts Inc., and hereafter referred to as ""), a third-party payroll company, which entered into independent contractor relationships with drivers working for STS.

Upon reviewing posted delivery requests from client-businesses, STS contacted drivers to offer posted loads, providing the terms of the delivery (e.g., pickup and delivery destination, delivery time window, rate of pay, etc.). A driver was free to decline a load. If a driver became unavailable after accepting an offer but before picking up the load from the client, STS found another driver to "get it covered". A driver was permitted to find another driver already approved by STS. Upon procuring a driver for a load, STS "pulled" or requested that load from the client for assignment to the driver.

STS's president met with the claimant and learned that he had a commercial driver's license while he was working for another transportation company. Upon learning that the claimant was leaving that job, the president approached and advised the claimant that STS had an available tractor-trailer and offered the claimant work, which the claimant accepted. The claimant also accepted the terms, including the offered payrate, without negotiation. The claimant completed STS's four-page packet of information. On August 5, 2017, the claimant executed STS's Truck Lease Agreement that provides, in part, as follows:

* STS will provide the driver with a tractor-trailer (also referred to as "vehicle"), the details and terms of which are outlined in Schedule "A" (not in evidence)¹.

* Upon delivery of the vehicle, the driver will complete and sign an In-Service Notification.

* The driver will pay STS the charges due under this Lease Agreement within 14 days after the date STS's invoice to the driver, subject to 18% per year late charges.

* The driver will report weekly the mileage/hours recorded on the trip log.

* STS will provide all the necessary maintenance, repairs, and road service for the leased vehicle.

* The insurance requirements and related provisions are set forth in Schedule "I" (not in evidence).

* The driver will provide STS with weekly trip reports, original fuel tickets or invoices, toll road and ton mile tax receipts, and any other requested documents.

* STS will provide fuel tax permits, will prepare and file fuel tax returns, and will pay the fuel taxes.

* STS will report and remit third structure taxes on driver's behalf and will bill the driver as they are incurred.

* STS will pay Federal Highway Use Tax and bill the driver as provided in Schedule "A" (not in evidence).

* The driver will operate the vehicle in a safe and careful manner, and not operate the vehicle under the influence of alcohol and drugs.

* STS may investigate driver's driving record.

* The driver will not overload any vehicle, and the driver will pay for any damage resulting from overloading. STS may and the driver will furnish payload weight documentation.

STS presented the claimant with 's enrollment packet, which included 's Owner/Operator Agreement that the claimant was directed to complete to receive his pay. On August 15, 2017, the claimant executed this Agreement that provides, in part, as follows:

* procures and qualifies drivers, and otherwise offers support to drivers in the transportation-courier industry, including STS.

* The driver will purchase through Occupational Accident Insurance coverage, or otherwise must present a Certificate of Workers' Compensation Insurance or Occupational Accident Insurance coverage naming and its customer (STS) to be held harmless from all liabilities (§7 and §12).

* The driver will not have any "non-essential" personnel on board the vehicle while it is on the delivery customer's premises or while the vehicle contains any freight consigned for transportation and delivery (§5 and §8).

* The driver will comply with all applicable laws.

* The driver will always maintain the driver log.

* The driver will notify and STS of all accidents and of any loss or damage to property transported, initially via telephone within four (4) hours of the occurrence, followed by a written report within five (5) days of the occurrence, together with any accident report.

* The driver's delivery shall be deemed complete when the pickup and delivery has been finished, and when all required paperwork (e.g., bill of lading) has been furnished.

* The driver is prohibited from using or disclosing any confidential information, and proprietary and trade secrets, belonging to or STS.

* The driver authorizes to conduct background checks, including criminal and motor vehicle records, and drug testing and credit reports.

STS sent the claimant's completed enrollment to . Meanwhile, the claimant had already started working for STS hauling loads. The day before each job, STS communicated the details of the load with the claimant to accept. The claimant did not turn down offered loads, which were all time sensitive.

STS provided the claimant with a key to enter its terminal. The claimant reported to the terminal to pick up the bill of lading and the truck keys from his designated mailbox. In the presence of STS personnel, the claimant signed STS's bill of lading as verification of accepting the load. Depending on availability, STS assigned various trucks to the claimant. The claimant completed two types of reports, the daily driver log and the trip log. At the end of a load, claimant returned the truck to the terminal and placed in his designated mailbox the requisite items, including truck keys, receipts, reports, and signed bill of lading.

The claimant contacted STS to notify of his unavailability. He communicated with STS regarding issues with a load. STS fielded complaints from its clients if they could not resolve issues with the drivers. STS provided a fuel card and an EZ-Pass to pay for tolls. The claimant did not reimburse STS for fuel

or tolls. STS furnished any needed equipment (e.g., electric jack to haul pallets off the truck). STS provided a safety vest. Some clients required and supplied their own safety vests to be worn while on the client's premises.

STS did not restrict drivers from competing with the STS. The claimant did not have his own trucking business. STS paid the claimant a portion of its per-delivery fee charged to its client, and the claimant's payment was funneled through . paid the claimant every Friday in his personal capacity. As an example of a pay week, the first week in 's Detailed Earnings Report provides the following:

- * Pay date of August 18, 2017 (Friday)
- * Pay period from August 7 to 13, 2017 (Monday to Sunday)
- * Total settlement of \$1,000.00
- * adjustment of \$52.00
- * Net paid of \$948.00

For most of the weeks, the claimant's settlement total ranged anywhere from about \$900 to \$1400 with the sole adjustment of \$52 every week to for the purchased insurance. The claimant did not pay for the truck lease, fuel, or tolls. issued IRS form 1099 in claimant's personal capacity.

OPINION: The evidence establishes that STS exercised, or reserved the right to exercise, sufficient supervision, direction, or control over the claimant's services to hold an employment relationship under the Unemployment Insurance Law. Here, STS offered the terms and conditions of employment that the claimant accepted without negotiation; STS contacted and offered the claimant delivery loads; the claimant accepted all offered loads; STS provided the tractor-trailer, fuel card, EZ-Pass, equipment, and safety vest; STS found substitute drivers and fielded client complaints; and the claimant contacted STS for time off and issues with a load. Further, STS provided a key to its terminal where the claimant started and ended all his trips, picked up and dropped off the various trucks STS assigned to the claimant, and picked up and dropped off in his designated mailbox the truck keys, receipts, completed reports, and signed bill of lading.

Although STS claims, and the Truck Lease Agreement indicates, that the claimant will be charged for the lease and other expenses, including fuel and tolls, we credit the claimant's testimony that he did not reimburse STS for such expenses. Significantly, the Detailed Earnings Report, which shows a weekly \$52 adjustment to for insurance, does not show any other

adjustments for such expenses. Also, although STS contends that it paid drivers after its clients paid STS, 's Detailed Earnings Report show that the claimant was paid on the next Friday following the week ending Sunday, which provides very little time for STS to collect from its clients.

The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure". Matter of Charles A. Field Delivery Service Inc., 66 NY2d 516 (1985), rev'g 112 AD2d 505 (3d Dept 1985). See, also, Matter of Casey [Larkfield Lottery], 140 AD2d 925 (3d Dept 1988). In this regard, this case is sufficiently like other truck drivers where the Court upheld an employment relationship. See e.g., Matter of Wilder (RB Humphreys Inc.), 133 AD3d 1073 (3d Dept 2015); Matter of Harold (Leonard's Transportation), 133 AD3d 1069 (3d Dept 2015); Matter of Scott (CR England Inc.), 133 AD3d 935 (3d Dept 2015); and Matter of Youngman (RB Humphreys Inc.), 126 AD3d 1225 (3d Dept 2015).

Also, the Court has also upheld other similar driver-couriers to be employees. See e.g., Matter of Relay Express Inc., 204 AD3d 1265 (3d Dept 2022); Matter of Smith (TN Couriers, LLC), 204 AD3d 1182 (3d Dept 2022); and Matter of Sow (NY Minute Messenger, Inc.), 201 AD3d 10 (3d Dept 2022). Further, STS exercised sufficient direction and control over the claimant's services above and beyond regulatory requirements. See Matter of Scott (CR England Inc.), 133 AD3d 935 (3d Dept 2015); compare Matter of Bogart (LaValle Transportation, Inc.), 140 AD3d 1217 (3d Dept 2016). The remaining common law contentions of STS, including its reliance on the Matter of Jennings (American Delivery Solution Inc., DBA Perfect Delivery Services), 125 AD3d 1152 (3d Dept 2015), are unpersuasive and otherwise lack merit.

Under these circumstances, the record amply supports the common law analysis that STS exercised, or reserved the right to exercise, sufficient supervision, direction, or control over the claimant's services to find an employer-employee relationship for unemployment insurance purposes.

In addition to the common law analysis, we examine this case under statutory law. Pursuant to Labor Law § 511 (1) (b) (1-c), the term "employment" includes

"any service . . . as an employee in the commercial goods transportation industry unless the presumption of employment can be overcome" under specified conditions laid out in Labor Law § 862 (the New York State Commercial Goods

Transportation Industry Fair Play Act). Labor Law § 862-a (3) defines

"[c]ommercial goods transportation services" as "the transportation of goods for compensation by a driver who possesses a state-issued driver's license, transports goods in ... New York, and operates a commercial motor vehicle" (Gross Vehicle Weight Rating of 10,001 pounds or more), and Labor Law § 862-a

(2) defines a "commercial goods transportation contractor" to include any legal entity that compensates a driver for performing such services. Labor Law § 862-b (1), provides, in relevant part, that "[a]ny person performing

commercial goods transportation services for a commercial goods transportation contractor shall be classified as an employee of the commercial goods transportation contractor unless" such person is either an independent contractor within the meaning of Labor Law § 862-b (1) or a separate business

entity as defined by Labor Law § 862-b (2) (emphasis added). To overcome the

statutory presumption, the commercial goods transportation contractor must satisfy one of the foregoing two statutory tests.

Under Labor Law § 862-b (1), commonly known as the ABC test, STS can overcome

the presumption of employment if "all of the following criteria are met, in which case the person shall be an independent contractor:

(a) the individual is free from control and direction in performing the job, both under his or her contract and in fact;

(b) the service must be performed outside the usual course of business for which the service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue." (Emphasis added.)

Although STS contends that it has satisfactorily met the requirements under the ABC test, we find otherwise. Significantly, as we have held above that STS exercised sufficient supervision, direction, or control over the claimant's services under the common law, STS has not met prong "A" of the ABC test.

Regarding prongs "B" and "C", STS contends that its business is merely brokering delivery services and that the claimant is in the independently established delivery business as a for-hire operator. Here, as STS provided the claimant with a tractor-trailer for each load and paid for claimant's expenses (e.g., fuel and tolls), STS is deemed in the business of "commercial goods transportation services" (Labor Law § 862-a [3]). Even if STS did not

provide or lease a commercial vehicle to the claimant, STS is deemed a "commercial goods transportation contractor" as it compensated the claimant "for performing such services" (Labor Law § 862-a [2]). Also, the record is

devoid of evidence that the claimant had his own business in commercial goods transportation services. Under these circumstances, STS met none of the three prongs of the ABC test.

Next, although STS contends it has satisfactorily met all eleven criteria of the "separate business entity" test under Labor Law § 862-b (2), STS fails on

several points. Here, not only have we found a common law relationship of "direction or control" over claimant's services (Labor Law § 862-b [2] [a]),

but the record demonstrates no "substantial investment of capital" by the claimant (Labor Law § 862-b [2] [c]). Also, neither Agreement in the instant

case was purportedly under the claimant's "business entity's name" (Labor Law § 862-b [2] [g]). Simply put, as the record establishes that the claimant

performed services for STS in his "individual" capacity, and not as a separate business entity, STS has failed the separate business entity test

under Labor Law § 862-b (2). See generally, *Matter of Martin* (Trucking Support

Services, LLC), 202 AD3d 1169 (3d Dept 2022); *Matter of Doster* (Fundamental Labor Strategies), 187 AD3d 1255 (2020); and Appeal Board No. 606792 & 606793.

Regarding STS's contention that the Fair Play Act is preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), the Court has determined that the FAAAA does not preempt the Fair Play Act, which "affect carriers' relationships with their workforce by classifying workers as employees or independent contractors." *Matter of Martin* (Trucking Support

Services, LLC), 202 AD3d 1169 (3d Dept 2022).

Under the entire circumstances of this case, the claimant is deemed STS's common law and statutory employee. Accordingly, the initial determination of liability for unemployment insurance tax contributions should be sustained.

DECISION: The combined decisions of the Administrative Law Judge are affirmed.

The initial determination, holding liable for contributions effective 4th quarter 2017 based on remuneration paid to the claimant and all other similarly situated drivers as employees under the common law and/or pursuant to the Commercial Goods Transportation Industry Fair Play Act, is sustained.

The claimant deemed to be an employee of and credited with remuneration from the employer regarding the claim for benefits effective January 14, 2019.

The employer is liable with respect to the decided issues.

MICHAEL T. GREASON, MEMBER

1 The Truck Lease Agreement, received in evidence, contained no attached schedules.

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